IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15/12/2003

CORAM

THE HONOURABLE MR.JUSTICE R.JAYASIMHA BABU
AND
THE HONOURABLE MR.JUSTICE S.R.SINGHARAVELU

T.C.No.450 of 2000 and T.C.No.451 of 2000

The Commissioner of Income Tax,
Tamil Nadu-I,
Chennai. .. Appellant in both the appeals

-Vs-

The Deputy Director of Small Savings,
Corporation of Chennai,
Ripon Buildings,
Chennai. .. Respondent
in both the appeals

Tax Cases (Appeals) against the order dated 27-7-1999 in I.T.A.Nos.2
73 and 274/MDS/99 on the file of the Income Tax Appellate Tribunal, "A" Bench,
Chennai.

!For appellant : Mr.K.Subramanian, Senior Standing Counsel for IT

^For respondent: Mr.V.Ramachandran, Senior counsel for
M/s.Anitha Suganth

:JUDGMENT

(The Judgment of the Court was delivered by R.Jayasimha Babu,J.)
The question raised by the Revenue in this appeal is as to whether the Tribunal was right in holding that distribution of prizes under the District Level Gift Linked Savings Mobilisation Scheme did not constitute 'lottery' and the provisions of Section 194-B of the Income Tax Act are not applicable and if applicable, as to whether the Tribunal was right in cancelling the penalty imposed.
2. In order to encourage thrift as also to mobilise funds for the developmental works, Saving Schemes are operated by the Government. Under the gift linked scheme, a prize coupon is given to the investor when the investment made is in excess of Rs.1,000/-. The investor does not pay any price for those coupons. Prizes are awarded to the holder of the lucky coupon, which is chosen by lot. The prizes given are consumer goods, such as, fan, colour television, moped etc. During the accounting year ended 31-3-1998, the assessment year being 1998-99, the respondent released prizes

worth Rs.72,94,480/-. According to the Revenue, before distributing those prizes, the assessee ought to have deducted tax at source in a sum of Rs.29,17,792/-.

3. As no tax had been deducted at source, the assessing officer, invoking the provisions of Section 201, issued notice to the respondent treating him as the assessee in default. Additional sum of Rs.2,39,919/- was also demanded as interest under Section 201(1-A) of the Act. Subsequently, penalty in a sum of Rs.29,17,792/- equal to the amount of tax that had allegedly required to be, but not with-held, was also levied.

4. The appeals filed by the respondent against those orders having proved unsuccessful, the respondent thereafter carried the matter to the Tribunal, which agreed with the assessee and held that the assessee was not liable to deduct tax at source and therefore, all the proceedings taken against the respondent were without jurisdiction.

5. Section 194-B of the Act, which was inserted with effect from 1-4-1972, as it stood at the relevant year, is captioned " Winnings from lottery or crossword puzzle". It reads thus:

"194-B: The person responsible for paying to any person any income by way of winnings from any lottery or crossword puzzle in an amount exceeding Rupees five thousand, shall, at the time of payment thereof, deduct income-tax thereon at the rates in force.

Provided that no deduction shall be made under this section from any payment made before the 1st day of June, 1972.

Provided further that in a case where the winnings are wholly in kind or partly in cash and partly in kind but the part in cash is not sufficient to meet the liability of deduction of tax in respect of whole of the winnings, the person responsible for paying shall, before releasing the winnings, ensure that tax has been paid in respect of the winnings."

6. By the Finance Act, 1972, which introduced Section 194-B, a new sub-clause (ix) was introduced in the definition of 'income' in Section 2(24) of the Act, which reads thus:

"2(24) ....

(ix) any winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature whatsoever "

The winnings from lotteries on and after 1.4.1972 were included within the scope of the definition of 'income' and the person responsible for paying to any person any income in excess of Rupees five thousand by way of winnings from lottery, was required to deduct income tax on the amount so paid at the rates in force. 7. Prior to 1.4.200 2, the Act did not contain a definition of 'lottery'. In the Finance Act, 2001, an Explanation was added below Section 2(24)(ix), which Explanation reads thus:

"Explanation:-- For the purposes of this sub-clause, --

(i) "lottery" includes winnings from prizes awarded to any person by draw of lots or by chance or in any other manner whatsoever, under any scheme or arrangement by whatever name called;

(ii) "card game and other game of any sort" includes any game show, an entertainment programme on television or electronic mode, in which people compete to win prizes or any other similar game; "

In this case, lottery is required to be construed without the aid of the Explanation that was subsequently added on 1-4-2002, as that Explanation is

not one to which retrospective effect has been given, nor can that explanation be regarded as merely clarificatory.
8. Lottery is defined in "The New Oxford Dictionary of English" as 'a means of raising money by selling numbered tickets and giving prizes to the holders of numbers drawn at random.'
9. The Words and Phrases, Permanent Edition, in Volume 25, sets out the definitions of 'lottery', one of which reads thus:
"A 'lottery' may be defined to be a game by which a person paying money becomes entitled to money or other thing of value on certain contingencies, determinable by lot cast in a particular way by the manager of the game."

10. Halsbury's Laws of England, Fourth Edition Reissue, Volume 4(I) at paragraph 7, which deals with 'lotteries', reads thus:
"There is no statutory definition of a lottery. However, it has been said that: 'A lottery is the distribution of prizes by chance where the persons taking part in the operation, or a substantial number of them, make a payment or consideration in return for obtaining their chance of a prize. There are really three points one must look for in deciding whether a lottery has been established: first of all, the distribution of prizes; secondly, the fact that this was to be done by means of a chance; and thirdly, that there must be some actual contribution made by the participants in return for their obtaining a chance to take part in the lottery' ."
In paragraph 151 of the same volume, titled "Payment or consideration from participants", it is stated thus:
"There is no lottery unless the persons taking part, or a substantial number of them, make a payment or consideration in return for obtaining their chance of a prize. Any form of contribution, whether money or any other valuable consideration, will suffice to render a lottery scheme prima facie unlawful. It is not, however, an essential characteristic of a lottery that prizes in a lottery should be paid for from participants' contributions, and a lottery will exist if participants pay to take part in a competition in which prizes have been donated by a third party.
Where a person buys two items for one price it is impossible to say that he paid for only one of them and not for the other. The fact that he could have bought one of the things at the same price that he paid for both is immaterial, and accordingly if one of the items so bought is a chance to participate in a lottery the price paid will be treated as a contribution to the lottery. Where, however, a promoter sets up a scheme by which participants are given genuinely free chances to win a prize, the scheme will not be treated as an unlawful lottery merely because it encourages some participants to purchase the promoter's goods and thereby increases his profits, even if the prizes are paid for out of those profits."
11. In "The Law Lexicon" by P.Ramanatha Aiyar, 'lottery' is defined "as a hazard in which sums are ventured for a chance of obtaining a greater value .... A lottery is a species of gaming, which may be defined as a scheme for the distribution of prizes by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize."
12. Thus, before the scheme can be regarded as a lottery, there must be the element of distribution of prizes which should be by chance or lot and such distribution be among those who had paid a price for participating in the scheme. Mere gratuitous distribution without any price having been paid by

the participants for acquiring the chance and receiving a prize that is ultimately distributed, would not amount to a lottery. That appears to be the reason why the Explanation was added under Section 2(24)(ix) of the Act with effect from 1.4.2002 to bring within the purview of Section 194-B, winnings from prizes awarded to any person by a draw of lots under any scheme or arrangement, whether or not the persons taking part in that arrangement, had paid a price for acquiring the chance of winning the prize. The Explanation lays emphasis on the winnings awarded by a draw of lots or chance.

13. The assessing officer, as also the Commissioner, had placed strong reliance on an old decision of this Court in the case of Sesha Ayyar vs. Krishna Ayyar (AIR 1936 Madres 225), in which the majority had held that a chit scheme under which Rupees three per ticket was to be paid for fifty months by 625 persons and to the holder of one lucky ticket to be drawn each month Rs.150/- was to be paid with the recipient no longer being liable to pay the monthly subscription for the remaining period, amounted to a scheme of lottery. Varadhachriar, J, who formed part of that majority, observed that the scheme may fairly be regarded as a lottery if it is clear that whatever other benefits the subscriber or competitor may get in return for his money, the chance of his getting the prize was also part of the bargain and must have entered into his calculation.

14. The decision of this Court with regard to kuris in AIR 1 936 Madras 225 was rendered after considering earlier English decisions, and by following the same. Subsequent decisions of the English Courts by the Court of Appeal in the case of Readers' Digest Association Ltd. vs. Williams, (1976) 3 All E.R. 757 and the one by the House of Lords in the case of Imperial Tobacco Ltd. vs. Attorney General (1980) 1 All E.R. 866 set out the current state of the law with regard to lotteries in England.

15. In the case of the Readers' Digest, it was held that to establish that a prize constitues a 'lottery' within S.41 of the Betting, Gaming and Lotteries Act, 1963 it must be shown, in addition to the distribution of prize by chance, the participants must have made some contribution in return for obtaining the chance of a prize, and that where a significant number of particip ants have made no such contribution the prize draw is not a lottery. In that case in an advertisement campaign to promote the sales of the magazine letters were sent to 4.7 million persons. Each letter carried a different number. Persons who did not accept to the sale offer also could, by sending their negative reply became eligible for one of 2103 prizes for the lucky numbers drawn by lot. While about 8.5 lakh recipients accepted the offer 15 lakh recipients rejected it but were nevertheless eligible for the prizes.

16. In the case of Imperial Tobacco, in a campaign to promote the sale of cigarettes 260 million cards were inserted in as many pockets sold at the regular price, which enabled the buyer of the pack with the lucky card on which amount of the prize was printed, to receive the prize, without having to pay anything extra for the card in the cigarette pack. The Court held that the payment made by the buyer was payment for the pack of Cigarettes as also for the card and that the card was not free. It was observed in that judgment that " what is essential is that there is a distribution of prizes by lot or chance, and that the chances should be secured by some payment or contribution by those who take part."

17. While the reported English cases dealt with the advertisement campaigns to promote the sale of goods, in the Kuri case decided by this Court the

scheme was held to be a lottery on the ground that there was no further obligation on the part of the winner at the monthly draw to pay future subscriptions.
18. The scheme here is not one for the promotion of sale of any goods. The investor is not offered interest payable on a larger sum, even when a smaller sum is invested. When the investment is made the full amount is payable and interest is paid thereon for the specified period, the investment as also the interest being eligible for concessions/exemptions under the Income-tax Act. The chance given to the investor to win a prize is a free chance, and is not a chance given in return for a price or contribution paid. The scheme is not a lottery.
19. The appeals are dismissed with costs in the sum of Rs.5 ,000/- (Rupees five thousand only).
20. The question regarding penalty does not require further consideration, as no penalty can possibly be imposed once it is found that there has been no violation of the law.

cs

To

1. The Assistant Registrar,
Income Tax Appellate Tribunal,
Rajaji Bhavan,III Floor, Besant Nagar,
Madras-90. (with records)
(5 copies)

2. The Secretary,
Central Board of Revenue, New Delhi. (3 copies)

3. The Commissioner of Income Tax,(Tamil Nadu-I), Madras.

4. The Commissioner of Income Tax,(Appeals) (XI), Madras.

5. The Income Tax Officer, T.D.S. VIII, Madras.